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Supreme Court, U.S.
FILED

FEB 25 1999

No. 98-238

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1998

**TOGO D. WEST, JR., SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, PETITIONER**

v.

MICHAEL GIBSON

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED: AUGUST 5, 1998
CERTIORARI GRANTED: JANUARY 15, 1999**

8988
f.o.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS (CHICAGO)

Docket No. 96-CV-223

MICHAEL GIBSON, PLAINTIFF

v.

TOGO D. WEST, JR, ACTING SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, DEFENDANT

DOCKET ENTRIES

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
1/11/96	1	COMPLAINT; jury demand - Civil cover sheet - Appearance(s) of Timothy Michael Kelly as attorney(s) for plaintiff Michael Gibson with Rule 39 affidavit (No summons(es) issued.) (Documents: 1-1 through 1-4) (ar) [Entry date 01/12/96]
1/11/96	—	RECEIPT regarding payment of filing fee paid; on 1/11/96 in the amount of \$ 120.00, receipt # 467351. (Ar) Entry date 01/12/96]

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
1/12/96	—	SUMMONS issued as to defendant Jesse Brown (mk) [Entry date 01/22/96]
1/19/96	2	MINUTE ORDER of 1/19/96 by Hon. Ruben Castillo: Status hearing set for 9:30 am on 2/21/96. The Court's review of this complaint indicates that this case is amendable to expedited treatment by the Court. The parties are specifically directed to address this issue in their joint status report, which is to be filed by 2/16/96. Counsel for plaintiff to notify all other parties of this Court's order. (See reverse of minute order). Mailed notice (ar) [Entry date 01/23/96]
1/23/96	3	DESIGNATION OF ATTORNEY Ernest Yi Ling as US Attorney (ar) [Entry date 01/25/96]
1/25/96	4	RETURN OF SERVICE of summons executed upon defendant Jesse Brown on 1/12/96 as to Jesse Brown (ar) [Entry date 01/29/96]

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
1/25/96	5	RETURN OF SERVICE of summons executed upon defendant Jesse Brown on 1/12/96 as to the U.S. Attorney (ar) [Entry date 01/29/96]
1/25/96	6	RETURN OF SERVICE of summons executed upon defendant Jesse Brown on 1/12/96 as to the James Burns (ar) [Entry date 01/29/96]
1/25/96	7	RETURN OF SERVICE of summons executed upon defendant Jesse Brown on 1/12/96 as to the Attorney General (ar) [Entry date 01/29/96]
1/25/96	8	DESIGNATION OF ATTORNEY Carole Judith Ryczek as US Attorney (ar) [Entry date 01/29/96]
2/16/96	9	INITIAL STATUS REPORT (nln) [Entry date 02/20/96]
2/16/96	10	STATUS REPORT by defendant; Notice of filing (nln) [Entry date 02/20/96]

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
2/21/96	11	MINUTE ORDER of 2/21/96 by Hon. Ruben Castillo: Status hearing held and continued to 9:00 am on 3/22/96. Today's status hearing was held in open court and continued in chambers. All litigation in this case is stayed, including the date for the government's responsive pleading until settlement discussions are fully exhausted. Mailed notice (ar) [Entry date 02/22/96]
3/22/96	—	SCHEDULE set on 3/22/96 by Hon. Ruben Castillo: Status hearing held and continued to 9:00 a.m. on 5/10/96. Discovery ordered closed on 6/28/96. Defendant to answer or otherwise plead on or before 3/29/96. Mailed notice (ro)
4/16/96	12	MOTION by defendant to dismiss the amended [complaint], or in the alternative for summary judgment; Notice of motion. (dk) [Entry date 04/18/96]

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
4/16/96	13	MINUTE ORDER of 4/16/96 by Hon. Ruben Castillo: Parties failed to appear. Plaintiff's response to defendant's motion to dismiss [12-1] or in the alternative for summary judgment [12-2] is due 05/16/96. Defendant's reply is due 5/28/96. Motion will be taken under advisement and the court will rule by mail. Status hearing set for 05/10/96 is stricken. Mailed notice (dk) [Entry date 04/18/96]
4/16/96	14	MEMORANDUM by defendant in support of motion to dismiss the amended [12-1], of motion for summary judgment [12-2] (dk) [Entry date 04/18/96]
4/16/96	15	RULE 12(m) Statement of material facts by defendant (Exhibits). (dk) [Entry date 04/18/96]

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
5/21/96	16	MOTION by plaintiff to strike exhibits attached to defendant's rule 12(M) statement; Notice of motion. (dk) [Entry date 05/22/96]
5/21/96	17	MINUTE ORDER of 5/21/96 by Hon. Ruben Castillo: Plaintiff's motion to strike exhibits attached to defendant's rule 12(M) statement [16-1] is granted to the extent that exhibits 3 and 4 are stricken. Plaintiff's response to defendant's motion to dismiss [12-1] or, in the alternative for summary judgment [12-2] is due 05/28/96. Defendant reply is due 06/03/96. Court will rule by mail. Mailed notice (dk) [Entry date 05/22/96]
6/3/96	18	REPLY MEMORANDUM by defendant in support of defendant's motion to dismiss the amended [12-1], of motion for summary judgment [12-2] (Exhibits). (dk) [Entry date 06/04/96]

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
6/7/96	19	MOTION by plaintiff for leave to file response instanter, or in the alternative for summary judgment; Notice of motion. (dk) [Entry date 06/10/96]
6/7/96	20	MINUTE ORDER of 6/7/96 by Hon. Ruben Castillo: Plaintiff's motion for leave to file response to defendant's motion to dismiss [19-1], or in the alternative for summary judgment instanter [19-2] is granted. Defendant's amended reply is due 06/26/96. A new discovery cutoff date will be set after the court rules on defendant's motion to dismiss [12-1], or in the alternative for summary judgment [12-2]. Mailed notice (dk) [Entry date 06/10/96]
6/7/96	21	MEMORANDUM OF LAW by plaintiff in response to motion to dismiss, or in the alternative [12-1], for summary judgment [12-2]. (dk) [Entry date 06/10/96]

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
6/7/96	22	RESPONSE by plaintiff to defendant's rule 12(M) statement (Exhibits). (dk) [Entry date 06/10/96]
6/7/96	23	NOTICE of filing by plaintiff regarding response [22-1], regarding motion response [21-1] (dk) [Entry date 06/10/96]
6/12/96	24	TRANSCRIPT of proceedings for the following date(s): 05/21/96 before Honorable Ruben Castillo (dk) [Entry date 06/13/96]
6/26/96	25	REPLY by defendant to plaintiff Michael Gibson's rule 12(N) statement (Exhibits). (dk) [Entry date 06/27/96]
6/26/96	26	SECOND REPLY by defendant in support of defendant's motion to dismiss [12-1], or in the alternative for summary judgment [12-2] (dk) [Entry date 06/27/96]
10/2/96	27	MEMORANDUM, OPINION, AND ORDER (dk) [Entry date 10/03/96]

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
10/2/96	28	MINUTE ORDER of 10/2/96 by Hon. Ruben Castillo: Enter memorandum opinion and order. Defendant's motion to dismiss the amended complaint [12-1], or in the alternative for summary judgment [12-2] is granted in part and denied in part. The court will retain jurisdiction over this case to determine a reasonable award of attorney's fees under the circumstances of this case. Plaintiff is given leave to file his petition for attorney's fees by 10/30/96. Defendant's objections, if any, due 11/21/96. Plaintiff's reply is due 12/01/96. The court will rule by mail terminating case. Mailed notice (dk) [Entry date 10/03/96]
10/2/96	29	ENTERED JUDGMENT (dk) [Entry date 10/03/96]
10/30/96	30	PETITION by plaintiff for attorneys' fees (Attachments); Notice of filing. (dk) [Entry date 10/31/96]

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
11/1/96	31	NOTICE OF APPEAL by plaintiff Michael Gibson from judgment entered [29-1], from Scheduling order terminating case [28-1], from motion minute order [28-2], from order [27-1], from motion minute order [17-1] (\$105.00 Paid) (cmf) [Entry date 11/04/96]
11/1/96	32	DOCKETING STATEMENT by plaintiff Michael Gibson regarding appeal [31-1]. (cmf) [Entry date 11/04/96]
11/4/96	—	TRANSMITTED to the 7th Circuit the short record on appeal. Mailed notice to all counsel. (cmf)
11/12/96	33	ACKNOWLEDGMENT of receipt of short record on appeal USCA 96-3776 (dk) [Entry date 11/13/96]

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
11/21/96	34	MEMORANDUM by defendant in opposition to plaintiff's petition for attorneys' fees [30-1] (dk) [Entry date 11/25/96]
11/26/96	—	TRANSMITTED to the 7th Circuit the long record on appeal no. 96-3776 consisting of one volume of pleadings, together with one volume of transcript of proceedings, filed under separate certificate. Mailed notice to all counsel. (hp)
12/2/96	35	REPLY by plaintiff in support of petition for attorneys' fees [30-1]; Notice of filing. (dk) [Entry date 12/03/96]
12/10/96	36	MINUTE ORDER of 12/10/96 by Hon. Ruben Castillo: Plaintiff's motion for attorneys' fees [30-1] is granted. The court hereby awards plaintiff total attorneys' fees of \$5,602.00 and total costs of \$352.25. The attorneys' fee award is awarded a rate of \$150.00 an hour, which this court expressly finds repre

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
		sents the appropriate hourly rate for work of this type in this area. The \$5,602.00 figure awards plaintiff's counsel this hourly rate for all work done prior to the complaint and all necessary work done after the filing of the complaint to the extent he prevailed in this case. Plaintiff is therefore awarded total fees and costs of \$5,954.25. The court expressly finds that this is a reasonable fee and costs award under the circumstances of this case. Mailed notice (dk) [Entry date 12/11/96]
5/21/98	37	OPINION from the 7th Circuit: Argued 9/24/97; Decided 3/3/98. (96-3776) (eav) [Entry date 05/28/98]
6/1/98	38	CERTIFIED COPY of order from the 7th Circuit: The judgment of the District Court is Reversed, with costs, and this cause is Remanded for further proceedings, in accordance with

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
		the decision of this Court entered on this date. [Appeal [31-1] (96-3776) (eav) [Entry date 05/28/98]
5/21/98	39	BILL OF COSTS submitted by U.S. Court of Appeals (eav) [Entry date 05/28/98]
5/21/98	40	LETTER from the 7th Circuit: Retaining record on appeal no. 96-3776 consisting of 1 volume of pleadings and 1 volume of transcripts (eav) [Entry date 05/28/98]
5/28/98	-	SCHEDULE set on 5/28/98 by Hon. Ruben Castillo: Status hearing set for 9:15 a.m. on 6/10/98 for the explicit purpose of setting this case for an immediate trial. Final pretrial order to be submitted on or before 6/24/98. Mailed notice (ro)
6/5/98	41	EMERGENCY MOTION by defendant Jesse Brown to stay trial; Notice of emergency motion (eav) [Entry date 06/10/98]

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
6/9/98	42	MINUTE ORDER of 6/9/98 by Hon. Ruben Castillo: Status hearing reset for 9/18/98 at 9:00 a.m. Defendant's emergency motion to stay trial is granted. [41-1] Pretrial order filing date of 6/24/98 is vacated. Government's answer to the complaint is due on or before 6/30/98. Parties are granted leave to conduct damages discovery until 9/15/98. Mailed notice (eav) [Entry date 06/10/98]
6/30/98	43	ANSWER by defendant Togo West Jr to complaint (eav) [Entry date 07/01/98]
9/3/98	45	MOTION by defendant to compel plaintiff to answer defendant's first set of interrogatories and requests to produce (Attachment); Notice of motion (eav) [Entry date 09/09/98]

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
9/4/98	44	LETTER from the 7th Circuit returning the record on appeal no. 96-3776 consisting of one volume of pleadings (eav) [Entry date 09/08/98]
9/8/98	46	MINUTE ORDER of 9/8/98 by Hon. Ruben Castillo: Status hearing reset for 11/18/98 at 9:00 a.m. Discovery cutoff extended to 11/30/98. Defendant's motion to compel plaintiff to answer defendant's first set of interrogatories and requests to produce is granted. [45-1] Plaintiff is to comply with all outstanding discovery by 9/22/98. Mailed notice (eav) [Entry date 09/09/98]
11/18/98	-	SCHEDULE set on 11/18/98 by Hon. Ruben Castillo: Status hearing held and continued to 9:15 a.m. on 1/19/99. Plaintiff is to produce all outstanding discovery to the defendant by 12/7/98. Discovery cutoff extended to 12/31/98. mailed notice (ro)

<u>DATE</u>	<u>DOCKET NUMBER</u>	<u>PROCEEDINGS</u>
1/19/99	-	SCHEDULE set on 1/19/99 by Hon. Ruben Castillo: Status hearing held. Counsel for defendant appeared. Counsel should notify this court when the Supreme Court makes its decision regarding this case. mailed notice (ro)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

96-3776

MICHAEL GIBSON, PLAINTIFF-APPELLANT

v.

JESSE BROWN, SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, DEFENDANT-
APPELLEE

DOCKET ENTRIES

<u>DATE</u>	<u>PROCEEDINGS</u>
11/4/96	U.S. civil case docketed. [96-3776] [888735-1] Appearance form due on 12/4/96 for Thomas P. Walsh, for Timothy M. Kelly. Transcript information sheet due 11/14/96. Appellant's brief due 12/16/96 for Michael Gibson (patb)
11/4/96	Filed Appellant Michael Gibson docketing statement. [96-3776] [888739-1] (patb)
11/4/96	[96-3776] ROA from No. Dist. Of Il., E. Div. due 11/15/96. (patb)

<u>DATE</u>	<u>PROCEEDINGS</u>
11/12/96	Filed Seventh Circuit Transcript Information Sheet by Timothy M. Kelly for Appellant Michael Gibson. [96-3776] [888735-1] (tim)
11/12/96	Appearance form filed by attorney(s) Timothy M. Kelly for Appellant Michael Gibson. [96-3776] [888735-1] (grac)
11/26/96	Filed instant motion by Appellee Jesse Brown to file docketing statement. [894471-1] O&3c docketing statement tendered. [894471-1] [96-3776] (jame)
11/26/96	Original record on appeal filed. Contents of record: 1 vol. pleadings; 1 vol. transcripts; [96-3776] [894538-1] (duda)
11/26/96	Terminated attorney Thomas P. Walsh for Jesse Brown and added attorney Ernest Y. Ling per appearance form. Appearance form filed for Appellee Jesse Brown by attorney Ernest Y. Ling. [96-3776] [888735-1] (jame)
12/2/96	Filed Appellee Jesse Brown docketing statement, per order. [96-3776] [895524-1] (nanc)

<u>DATE</u>	<u>PROCEEDINGS</u>
12/2/96	ORDER issued GRANTING instant motion to file docketing statement. [894471-1] The clerk of this court is directed to file instant the tendered copies of the appellant's Circuit Rule 3(c) docketing statement. [888735-1] AK [96-3776] (patb)
12/6/96	Filed motion by Appellant Michael Gibson to extend time to file appellant's brief. [897993-1] [96-3776] (fern)
12/16/96	ORDER issued GRANTING motion for extension of time to file appellant's brief. [897993-1] AK [96-3776] Appellant's brief due 1/3/97 for Michael Gibson. 2. The appellee(s) brief is due on or before 2/3/97 for Jesse Brown. 3. The reply brief, if any, is due 2/18/97 for Michael Gibson. (tim)
1/2/97	Filed motion by Appellant Michael Gibson to extend time to file appellant's brief. [906439-1] [96-3776] (tim)

<u>DATE</u>	<u>PROCEEDINGS</u>
1/10/97	ORDER issued GRANTING motion for extension of time to file appellant's brief. [906439-1] AK [96-3776] Appellant's brief due 1/14/97 for Michael Gibson. 2. The appellee(s) brief is due on or before 2/14/97 for Jesse Brown. 3. The reply brief, if any, is due 2/28/97 for Michael Gibson. (nanc)
9/24/97	Case heard and taken under advisement by panel: Circuit Judge Kenneth F. Ripple, Circuit Judge Daniel A. Manion, Circuit Judge Michael S. Kanne. [96-3776] [990600-1] (broo)
9/24/97	Case argued by Timothy M. Kelly for Appellant Michael Gibson, Ernest Y. Ling for Appellee Jesse Brown. [96-3776] [888735-1] (broo)
3/3/98	Filed opinion of the court by Judge Manion. The decision of the District Court is REVERSED and this cause is REMANDED for further proceedings. (This opinion was circulated to the full court for a vote on whether to grant rehearing en banc in advance of decision. See Cir.R. 40(e). There were no votes to grant rehearing.) Circuit Judge Kenneth

<u>DATE</u>	<u>PROCEEDINGS</u>
	F. Ripple, Circuit Judge Daniel A. Manion, Circuit Judge Michael E. Kanne, [96-3776] [888735-1] (path)
3/3/98	ORDER: Final judgment filed per opinion. With costs: y. [96- 3776] [1037637-1] (path)
3/16/98	Filed Appellant Michael Gibson Bill of Costs in the amount of \$993.00. [96-3776] [888735-1] (fran)
4/17/98	Filed 30c Petition for Rehearing with Suggestion for Rehearing Enbanc by Appellee Jesse Brown. Dist. [96-3776] [1053562-1] (orac)
4/21/98	Terminated attorney Ernest Y. Ling for Jesse Brown and added attorneys Marleigh D. Dover and Steve Frank, per appearance form. Appearance form filed for Appellee Jesse Brown by attorneys Marleigh D. Dover and Steve Frank. [96-3776] [929697-1] (orac)
5/7/98	ORDER: Appellee Jesse Brown Petition for Rehearing with Suggestion for Rehearing Enbanc is DENIED. [96-3776] [1053562-1] (heid)

<u>DATE</u>	<u>PROCEEDINGS</u>
5/15/98	MANDATE ISSUED WITH BILL OF COSTS IN THE AMOUNT OF \$993.00. RECORD ON APPEAL TO BE RETURNED LATER. (Contents to be returned: 1 vol. pleadings; 1 vol. transcripts.) [96-3776] [929697-1] (nick)
5/22/98	Filed mandate receipt. [96-3776] [1064640-1] (fran)
8/10/98	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No. 98-238. [96-3776] [1088737-1] (jame)
9/3/98	Partial record returned to the District Court. (Contents returned: 1 vol. pleadings. Record to be returned: 1 vol. transcripts.) [96-3776] [888735-1] (fern)
9/28/98	Filed record receipt. [1103730-1] [96-3776] (fran)
1/25/99	Field order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 98-238. [96-3776] [1140882-1] (path)



Veterans Administration

COMPLAINT OF EMPLOYMENT DISCRIMINATION IN THE VETERANS ADMINISTRATION

(PLEASE PRINT OR TYPE)

		VA - CENTRAL OFFICE USE ONLY	
		COMPLAINT NO.	
		DATE FILED	
1. NAME OF COMPLAINANT (Last, first, middle) GIBSON, MICHAEL	2. ADDRESS (Include P.O. Box, City, State and ZIP Code) 1033 S. WESTMORE #206 LOMBARD, IL 60148	3. TELEPHONE NOS. (Include Home, Work and Area Code) HOME 708-627-0508 WORK 708-786-6029	
4. NAME OF VA FACILITY INVOLVED VA SUPPLY DEPOT	5. ADDRESS OF VA FACILITY (City, State and ZIP Code) PO BOX 27 HINES, IL 60141	6. YOUR JOB TITLE (Grade and Service or Department, if a VA employee) ACCOUNTANT GS-9 FISCAL DIVISION	
7. BASIS OF COMPLAINT (Check one or more, as appropriate) <input type="checkbox"/> RACE (Specify) <input type="checkbox"/> COLOR (Specify) <input type="checkbox"/> RELIGION (Specify) <input checked="" type="checkbox"/> SEX (<input checked="" type="checkbox"/> Male or <input type="checkbox"/> Female) <input type="checkbox"/> NATIONAL ORIGIN (Specify) <input type="checkbox"/> AGE (Specify date of birth)		<input type="checkbox"/> HANDICAP (See instructions on reverse) <input type="checkbox"/> REPRISAL (See instructions on reverse)	
8. DESCRIBE EACH ISSUE IN YOUR COMPLAINT (For each name, state what happened, when it happened and who was responsible (if known). Attach additional sheets) if required. NON-SELECTION FOR ANNOUNCEMENT 92-24 DATED 2-28-92, INSTEAD ANNOUNCEMENT WAS REISSUED AND GIVEN TO AN EMPLOYEE WHO DID NOT QUALIFY FOR BID 92-24. PERSONNEL GAVE NO NOTICE OF CANCELLATION OF BID 92-24, OR SELECTION OF BID 92-41.			
9. DESCRIBE HOW THE BASIS AND THE ISSUE BLOCKS 7 AND 8 ARE RELATED (For example, why do you believe that your race, color, religion, sex, national origin, age, handicap, and/or reprisal were responsible for what happened. Attach additional sheets) if required. SELECTING OFFICIAL STATED THAT ALL APPLICANTS IN THE FISCAL DIVISION FOR THE POSITION WERE VERY GOOD, IN FACT I WORKED THE POSITION FOR SEVERAL MONTHS, AND FELT I WAS IN THE RIGHT PLACE AT THE RIGHT TIME WITH THE RIGHT CREDENTIALS, HOWEVER A EMPLOYEE WHO DID NOT QUALIFY FOR BID 92-24 WAS SELECTED, I CAN ONLY CONCLUYDE THAT PRESELECTION WAS OVER			
10. WHAT CORRECTIVE ACTION ARE YOU SEEKING? (Attach additional sheets) if required. GS-11 BACKPAY, TRANSFER TO VA HINES HOSPITAL, OR OTHER HOSPITAL OF MY CHOICE.			
11. DO YOU HAVE A REPRESENTATIVE? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		12. NAME OF REPRESENTATIVE	
13. HAVE YOU DISCUSSED THIS COMPLAINT WITH AN EEO COUNSELOR? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		14. NAME OF EEO COUNSELOR VAN T. MITCHELL	
THIS IS A LEGAL DOCUMENT. PLEASE READ CAREFULLY			
CERTIFICATION: I have reviewed the information on this form (and on attachments hereto) and certify that it is true and complete to the best of my knowledge and belief.			
15. SIGNATURE OF COMPLAINANT (Do Not Print) Michael Gibson		16. DATE 12-7-92	

INSTRUCTIONS

NOTE: Please read carefully before filing in each block. If you need assistance in completing this form, you should contact your EEO Counselor.

Each block is self-explanatory. However, with respect to block 7, if you have checked "Handicap", please provide specific information on the nature of your handicap and whether it is permanent or temporary. If you have checked "Reprisal", please provide an explanation of the nature of the prior complaint activity in which you engaged, that forms the basis for this allegation. For example, did you file a previous EEO complaint? If so, when? Were you a witness or a representative in another individual's prior EEO complaint? If so, whose complaint and when did you serve in that capacity?

Blocks 8 and 9 are crucial for determining the acceptability of your complaint for investigation. Therefore, you should provide as much detail as possible in each of these two blocks, particularly with respect to the exact dates involved. In addition, the issues described in block 8 should be limited to those issues discussed with the EEO Counselor in a timely fashion (i.e., within 30 calendar days of occurrence of the act or within 30 calendar days of the effective date of the act, if a personnel action). If any of the acts which you discussed with the EEO Counselor were not brought to the attention of the EEO Counselor in a timely fashion, time limits may be waived under limited circumstances. However, in order for time limits to be waived, you must explain, in detail, why you were untimely. In addition, this complaint must be filed within 15 calendar days of your receipt of a notice of final interview with an EEO Counselor. If you do not file the complaint within the required 15 calendar days, you must also explain your untimeliness in similar fashion. It is essential that you include explanations of any untimeliness when you file your complaint, along with all evidence which may support your explanation. Failure to do so may result in rejection of your complaint.

NOTICE

IT IS YOUR RESPONSIBILITY AS A COMPLAINANT TO KEEP THE VETERANS ADMINISTRATION INFORMED OF YOUR CURRENT ADDRESS. IF YOU MOVE, YOU SHOULD IMMEDIATELY ADVISE THE VETERANS ADMINISTRATION OFFICE WHERE YOU FILED THIS COMPLAINT OF YOUR NEW ADDRESS. FAILURE TO DO SO COULD RESULT IN CANCELLATION OF YOUR COMPLAINT. IN ADDITION, YOU MAY, FROM TIME TO TIME, RECEIVE CORRESPONDENCE IN CONNECTION WITH THIS COMPLAINT BY CERTIFIED MAIL. IT IS YOUR RESPONSIBILITY TO CLAIM ALL CERTIFIED MAIL. SINCE SOME OF THIS MAIL MAY REQUIRE A RESPONSE FROM YOU WITHIN A SPECIFIC TIME FRAME, FAILURE TO CLAIM CERTIFIED MAIL COULD RESULT IN CANCELLATION OF YOUR COMPLAINT FOR FAILURE TO RESPOND TO COMPLAINT RELATED CORRESPONDENCE IN A TIMELY FASHION.

PRIVACY ACT STATEMENT

Collection of the information on this form is authorized and/or required by the regulations of the U.S. Equal Employment Opportunity Commission (EEOC), 29 CFR, Section 1613, and/or by the Veterans Administration (VA), in VA Manual MP-7, Part I, Chapter 3. The information collected will be used by the VA to determine whether your complaint is acceptable for investigation and in connection with any subsequent investigation and decision on your complaint. In the course of any investigation as may occur, this form may be shown to any individual who may be required by regulations, policies or procedures of the EEOC and/or the VA to provide information in connection with this complaint, including individuals you may have identified as responsible for the matters at issue in this complaint.

9.

MADE BASED ON SEX, ALL SUPERVISORS ARE NOW FEMALE. THIS
TYPE OF DISCRIMINATION SHOULD NEVER BE TOLERATED, HOWEVER
WHEN ITS AIMED AT A VETERAN, AT THE VETERANS SUPPLY
DEPOT, WORDS CAN'T DESCRIBE IT. VETERANS ARE WHY WE
HAVE JOBS.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 96 C 0233

MICHAEL GIBSON, PLAINTIFF

vs.

JESSE BROWN, SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, DEFENDANT

COMPLAINT

Plaintiff Michael Gibson, by his attorney Timothy M. Kelly, complains of defendant Jesse Brown, Secretary of the Department of Veterans Affairs, as follows:

1. Plaintiff Michael Gibson is a natural person residing in Lombard, Illinois, in the Northern District of Illinois.
2. Defendant Jesse Brown is the Secretary of the Department of Veterans Affairs, an agency in the executive branch of the government of the United States of America.
3. The transactions and events giving rise to this complaint occurred in whole or in substantial part in Hines, Illinois, in the Northern District of Illinois.
4. The United States District Court has jurisdiction of this cause pursuant to 28 U.S.C. § 1331 (federal

question); 28 U.S.C. § 1346 (United States defendant); and 42 U.S.C. §§ 2000e-5 and 2000e-16 (employment discrimination).

5. Throughout 1992, plaintiff Michael Gibson ("Gibson") was employed as a GS-9 Accountant in the Department of Veterans Affairs ("VA") Fiscal Division, Supply Depot, Hines, Illinois. In 1992, the VA advertised a position as a GS-12 Supervisory Accountant, which would have represented a promotion for Gibson. Gibson applied for the promotion, but the VA selected a female applicant.

6. On December 7, 1992, Gibson filed a timely equal employment opportunity complaint alleging discrimination based on sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

7. On December 28, 1993, the VA issued its final agency decision finding no discrimination.

8. On January 24, 1994, Gibson filed a timely appeal with the United States Equal Employment Opportunity Commission ("EEOC") from the decision of defendant Jesse Brown, Secretary of the VA.

9. On October 6, 1995, the EEOC issued its final decision, reversing defendant's decision. A true and accurate copy of the EEOC's decision is attached to this complaint as Exhibit "A."

10. The EEOC found that Gibson established a *prima facie* case of discrimination on the basis of sex, and that the VA's purported nondiscriminatory reasons for passing over Gibson, including his supervisor's criti-

cisms, "were a pretext for discrimination." (Exhibit A, pp. 6, 8.)

11. The EEOC ordered the VA to promote Gibson to the GS-12 Supervisory Accountant position within 30 days, and to calculate backpay within 60 days. Although the EEOC ordered the VA to pay Gibson's attorney's fees, Gibson processed his own claim up to the date of the EEOC decision. The EEOC did not order the VA to pay front pay, compensatory damages for mental anguish or emotional distress, or attorney's fees in enforcing the EEOC's order or in pursuing further remedies.

12. The VA has filed no request for reconsideration or appeal from the decision of the EEOC, and the time for doing so has expired. Therefore, the VA cannot contest the EEOC decision, and the EEOC decision is binding upon the VA.

13. The VA has promoted Gibson to GS-12, but it did not do so within the time ordered by the EEOC.

14. The VA has neither calculated nor paid Gibson his backpay in violation of the EEOC order.

15. Gibson received the EEOC decision on October 13, 1995. This complaint is filed within the 90 day period for filing civil actions.

16. Gibson accepts and adopts the EEOC decision with respect to the VA's liability for employment discrimination, and Gibson's entitlement to promotion, backpay and attorney's fees through October 6, 1995. Gibson is entitled to an order enforcing the EEOC decision on these matters.

17. In addition to the wrongful deprivation of the promotion and backpay, Gibson has suffered and is continuing to suffer humiliation, mental anguish and emotional distress as a direct and proximate result of the VA's intentional and unlawful discrimination. Gibson worked for three years under a supervisor who wrongfully criticized his character and abilities in order to pass him over and promote a far less experienced co-worker; and the VA supported the supervisor in her wrongful criticism of Gibson. Now, Gibson must work for the very supervisor who discriminated against him, a supervisor whose motives and credibility were successfully challenged by Gibson.

18. Gibson is entitled to an award of compensatory damages, front pay, and attorney's fees since October 6, 1995, all in an amount in excess of \$50,000.00.

WHEREFORE, plaintiff Michael Gibson requests that this Honorable Court enter judgment in his favor against defendant Jesse Brown, Secretary, Department of Veterans Affairs, as follows:

A. Ordering defendant to submit a backpay calculation to plaintiff forthwith;

B. Enforcing the EEOC decision requiring the VA to adhere to the deadline for payment of the undisputed portion of backpay as if defendant has complied with the deadline for calculating backpay;

C. Declaring the rights of the parties with respect to assignment, transfer, retirement, pension and other terms and benefits of employment;

D. Setting a trial by jury as to compensatory damages;

E. Entering judgment in favor of plaintiff against defendant for compensatory damages; and

F. Awarding plaintiff front pay, attorney's fees and such other or further relief as may be deemed just.

**PLAINTIFF DEMANDS A JURY TRIAL
AS TO ALL ISSUES TRIABLE BY JURY.**

Respectfully Submitted,

BEERMANN, SWERDLOVE, WOLOSHIN,
BAREZKY, BECKER, GENIN & LONDON

By: /s/ TIMOTHY M. KELLY
TIMOTHY M. KELLY

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[Seal Omitted]

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

Appeal No. 01941821
Agency No. 93-2306

MICHAEL GIBSON, APPELLANT

v.

JESSE BROWN, SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, AGENCY

DECISION

INTRODUCTION

On January 24, 1994, Michael Gibson (hereinafter, appellant) filed an appeal with the Equal Employment Opportunity Commission (hereinafter, the Commission or the EEOC) from a final decision of the Secretary, Department of Veterans Affairs (hereinafter, the agency) dated December 28, 1993. The final agency decision (FAD) concerns appellant's equal employment opportunity (EEO) complaint, alleging discrimination based on sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* The

Commission hereby accepts the appeal in accordance with EEOC Order No. 960, as amended.

ISSUES PRESENTED

Whether appellant proved by a preponderance of the evidence that the agency discriminated against him on the basis of sex (male) when in late 1992, he was nonselected for the position of Supervisory Accountant, GS-11/12, under either Vacancy Announcement (VA) No. 92-23 or 92-41.

CONTENTIONS ON APPEAL

Appellant contends that the agency's reasons to support the contested selection lack credence. As proof, he maintains that the justification provided by the agency contradicts the performance appraisals he consistently received and also notes that management never counseled him about his alleged deficiencies.

The agency insists that the criticisms voiced by the agency are not at odds with appellant's performance appraisals since they impact on qualifications such as motivation and initiative which are different from the "division-wide" standards applied to performance assessments.

BACKGROUND

On December 7, 1992, appellant filed a formal EEO complaint raising the issue stated above. The complaint was investigated and following the investigation, appellant was timely provided a copy of the investigative file. Appellant then requested a hearing before an EEOC Administrative Judge (AJ) but later withdrew his petition and instead requested a FAD based on the existing record. The agency issued its [sic] decision on

December 28, 1993, finding no discrimination. It is from this decision that appellant now appeals.

At the time of the alleged discriminatory act, appellant was employed by the agency as a GS-9 Accountant in the Fiscal Division, Supply Depot, Hines, Illinois. He began his employment with the agency in 1988 as an accountant in Albuquerque, New Mexico. He was assigned to the Hines facility in 1990.

On February 28, 1992, the agency advertised the subject position nation-wide at the GS-11/12 level through VA 92-24. Appellant applied for the position and was interviewed but was not selected. The record discloses that a female applicant from another state was initially awarded the position but declined the offer. Then, a male candidate was selected but this selection was disapproved by Central Office. On June 6, 1992, the agency readvertised the position in-house under VA 92-41, at the GS-9/11/12 level. The selectee (ST), a GS-9 female accountant with the Fiscal Division since 1991, was the only new applicant under the second announcement.

Appellant contended that he was far more qualified than the ST. In this regard, appellant claimed that the ST lacked the technical knowledge and the experience for the position due to her short tenure at the Fiscal Division and her limited exposure to the different accounting functions conducted in the Division. As a consequence, appellant maintained that the ST did not have the necessary expertise to perform as a supervisor. He noted that during the 13 years he had worked at the Fiscal Division, he had received "four satisfactory, five highly satisfactory, and four superior performance ratings". He had received several cash

awards and special contribution awards in recognition of his work as well. In addition, and contrary to the ST, he was selected for and completed the 12-month VA Central Office Accountant program.

The record discloses that the selecting officials (SOs) for the contested position were the Chief of the Fiscal Division (CFD) and the Assistant Financial Manager (AFM), both females.

The CFD testified that she based her decision on a review of information submitted by the applicants, taking into consideration "education, experience, if they had supervisory experience . . ., motivation and initiative . . . the accuracy and thoroughness of work, supervisory skills, if any, training, past performance ratings, writing ability is extremely important and cooperation with peers and supervisors." Regarding the ST, the CFD noted that she "had a lot of banking and accounting experience from prior years . . . about 10 years . . . she was extremely motivated . . . had won an award for being on a special project . . . had excellent writing ability . . . teacher credentials . . . was good in helping other people . . . [and] she worked on receivables and has gotten those down to the lowest level we have had since I have been here."¹

In reference to appellant, the CFD observed that she was dissatisfied with his performance because appellant had submitted the functional cost report two months late on one occasion when he was detailed as a supervisor. The witness also noted that when appellant was "acting Chief" of the accounting section, he com-

¹ The CFD acknowledged that it had been another coworker and not the ST who received "an award for receivables," however.

plained to her several times that "he couldn't get the cooperation of the people who worked for him," which in her view demonstrated lack of leadership. The CFD further noted that appellant was argumentative during his tenure as acting Chief. When the document control system was implemented, he told her that he needed five additional persons to do the job without offering her any alternative.

In her opinion, appellant "lacked the initiative to attempt to improve the accuracy and efficiency of the section appearing to be satisfied with the status quo." Although she acknowledged that appellant had "sufficient training and experience," the CFD maintained that his "motivation and initiative were average." Notwithstanding this observation, the CFD noted that during his tenure as acting Chief, appellant received fully successful performance ratings in 1989 and 1990 and a highly successful one in 1991.

The AFM also provided testimony in this matter. The AFM testified that although the ST did not have the experience working in other areas of the accounting section outside the function of accounts receivables, she was "very motivated." The affiant also observed that "you don't need to have expertise to be a supervisor." In this connection, the AFM maintained that accounts receivables was "a very important part of the accounting section." The witness observed that in reaching their decision, she and the CFD took into consideration "education . . . training . . . supervisory comments, . . . academic achievements and attitude." She further observed that the ST had experience in "accounting and banking" in private industry, was a "hard worker," and also participated in a study conducted by the Service

and Reclamation Division. As to appellant, the AFM asserted that he "was not as motivated as [the ST]" and noted that "[appellant] didn't put any effort into improving the procedures." The affiant reiterated the CFD's testimony that appellant had required five individuals to perform document control and also that appellant "had some problems getting subordinates' cooperation." The witness failed to provide specific details to support her observations. The AFM further noted that in December 1991 Central Office requested that operations expenses be reduced but that appellant failed to do a cost study and did not address said request.²

Appellant rebutted the SOs' testimony, claiming that the ST had been preselected for the position and favored by management since she came to the Fiscal Division in February 1991. In this regard, appellant noted that the ST came to the Division at the GS-7 level and was promoted to the contested supervisory position in 1-1/2 years. Responding to the charge that as an acting Chief he was argumentative and requested five additional employees to implement document control procedures, appellant observed that he discussed this matter with the CFD but denied being argumentative. In support of his position at that time, appellant noted that "now they have a database that does that managed by a full time employee." Appellant denied that he complained to the CFD about lack of cooperation from his subordinates or that he refused to comply with a request from Central Office pertaining to expense reduction. In regard to the request from Central Office,

² The AFM acknowledged that she did not know if appellant actually performed the study because she was on vacation.

appellant claimed that he did not know what the CFD really meant. Appellant explained that when he was Chief Accountant he had to deal with a discrepancy in a certain account and to this effect he called Central Office. Appellant indicated that he was told by Central Office that the problem would be addressed at their level, not at Hines, and that he informed the CFD about the instructions he received from Central Office.

A review of both VAs 92-24 and 92-41 discloses the following knowledge, skills and abilities as rating factors for the position:

1. Ability to effectively communicate orally and in writing.
2. Knowledge of supervisory methods and techniques to develop, motivate and manage an accounting staff.
3. Knowledge of principles and practices of Accounts Receivable/Payable, cost accounting, cost control and budget planning involving CALM and Log/CALM computer systems.
4. Knowledge of Federal accounting language, accounting principles, financial statements, and determining the nature and quality of the operations.
5. Knowledge of and understanding of computer technology, including electronic data interchange in a modern fiscal organization.

The agency had failed to include in the file a copy of appellant's SF-171.³ The ST's SF-171 reveals that she earned a BA degree in January 1991 and began her employment at the Supply Depot on February 1991 as an Accountant in the Analysis and Reconciliation Section. In her SF-171, the ST indicated that prior to her current position, from 1983 to 1989, she worked part-time (30 hours) as the office manager (60%) and bookkeeper (40%) of a music studio, where she supervised one employee. From 1983 through 1989, she was employed by a Bank as a Teller (60%) and bookkeeper (40%) of a music studio, where she supervised one employee. From 1983 through 1989, she was employed by a Bank as a Teller (60%) and Account Representative (40%). From 1977 through 1983, she served as a rental representative in a car rental corporation. The ST's SF-171 is dated June 3, 1992. On June 12, 1992, the ST submitted an employee supplemental qualifications statement to her SF-171, in which she extensively addressed the KSAs set forth in the Vacancy Announcement.

Pursuant to the facility's Merit Promotion Policy No. 6-88, candidates for GS positions were rated by a promotion panel unless there were six or less qualified candidates for the job. Since the applicant pools for VAs 92-24 and 92-41 were of six or less candidates, no promotion panel was needed. The record shows that an "unofficial merit promotion panel"⁴ was constituted to rate the applicants, however. Appellant was awarded

³ The agency did include [a] copy of the SF-171 submitted by the male applicant initially selected by the agency as its second choice. This document is irrelevant to the matter before us.

⁴ The record does not identify the members of this panel.

the highest score, 18 points. The ST received 8 points, the lowest rating of all the in-house applicants.

According to appellant's testimony, appellant served as supervisory accountant for five months and also served as supervisory accountant⁵ from September 16 through December 15, 1991. The record reveals that in March 1992 appellant applied for the position of Assistant Chief, Fiscal Service, in Prescott, Arizona. The AFM prepared appellant's supervisory appraisal, and from out of six KSA's she gave applicant two 5's and four 4's. An examination of this document reveals that in reference to element 1, "Knowledge of accounting and budget operations in order to make sound decisions involving funds," the AFM noted in relevant part, "This experience accords him the ability to identify and analyze problems and find alternative solutions to these problems as demonstrated by his performance specially when he served as Acting Chief of Accounting. . . ."

Pertaining to element two, "Ability to organize work, establish priorities and meet deadlines," the AFM indicated "He is excellent in organizing work, establishing priorities and meeting deadlines. This ability was best demonstrated when he was Acting Chief of Accounting. All reports under his control were submitted on time. . . ."

With regard to element five for which he received five score points, "Ability to manage, supervise and assign workloads, delegate authority, etc." the AFM stated: "He acquired these abilities when he served as Chief of Accounting. He managed the section very well. He

⁵ This position is frequently referred to by management as "Chief of Fiscal Service."

recognized problems and addressed them accordingly. He assigned workloads and delegated authority to his subordinates. By doing these, he found sufficient time to manage and supervise the accounting staff."

The record discloses that appellant was rated "highly successful" for the period April 1, 1991, through March 31, 1992. This performance appraisal was ratified by the AFM. The referenced appraisal covered the period appellant was detailed as supervisory accountant (September 16, 1991 through December 15, 1992).

The record reveals that all managerial positions in the Fiscal Division were held by females.

ANALYSIS AND FINDINGS

Appellant's allegation of discrimination concerns disparate treatment in employment. This allegation of intentional employment discrimination is properly analyzed under a three-part evidentiary scheme. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973) (applying the evidentiary scheme to Title VII); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-259 (1981) (clarifying the scheme).

The record indicates that appellant succeeds in establishing a *prima facie* case of discrimination on the basis of sex. It is undisputed that appellant was qualified for the position and despite his qualifications the position was awarded to a female.

The agency, through the SOs, articulated legitimate nondiscriminatory reasons to justify nonselecting appellant. Appellant lacked the attitude and motivation

to successfully perform in a supervisory position. In support of this contention, the agency points to appellant's alleged deficiencies when he served as acting Chief of the accounting section and further notes that appellant was argumentative, untimely in his reports, and his "motivation and initiative were average." The Commission finds that the agency has met its burden of going forward with the evidence.

In order to prevail, appellant must now show by a preponderance of the evidence that the reasons advanced by the agency are pretextual. Based on the evidence of record, the Commission finds that appellant

According to the SOs, appellant was not selected because they were dissatisfied with his performance while detailed as a supervisor. In this regard, the CFD testified that appellant submitted the functional cost report two months late, complained that he could not get the cooperation of his subordinates, and was argumentative when he requested more personnel to implement the document control system. In addition, the AFM observed that appellant failed to address a cost study request from Central Office. The agency further contended that, in contrast to appellant, the ST was a "hard worker" and was "extremely motivated," had impressive writing ability and was good in helping people, qualities she enhanced through her teaching experience. The agency also highlighted the fact that the ST had significantly lowered the accounts receivables and had also received an award for her participation in a study conducted by the Service and Reclamation division. The agency emphasized the ST's "banking" experience in the private sector and further observed that accounts receivables, the accounting

function to which the ST was assigned, was "a very important part of the accounting section."

After carefully reviewing all the evidence before us, we find that the agency's reasons for not selecting appellant, as articulated by the SOs, are unsupported by the record.

The record discloses that appellant had been an accountant with the agency since 1988. The agency has not disputed his testimony that during these years of employment he had received cash awards and special contributions awards in recognition of his work. Nor has the agency denied that his performance appraisals had been above average throughout the years. It is significant to note that he received a "highly successful" rating which covered the period he performed as acting Chief of the accounting section. This performance appraisal was approved by the AFM. The record further reveals that when in March 1992 appellant applied for the position of Assistant Chief, Fiscal Service, in Prescott Arizona, the AFM gave appellant a glowing supervisory appraisal for promotion, mostly based on his successful accomplishments as Acting Chief of Accounting in the Hines Supply Depot. The record further discloses that appellant was selected for and completed the 12-months VA Central Office account program. Furthermore, when assessed by the unofficial merit promotion panel that rated the applicants, the panel awarded appellant the highest score (18 points) as compared with the ST who received the lowest rating (8 points).

Regarding the ST, we note, that she came to the agency in 1991 and that her work had been limited to the accounts receivable function. Her SF-171 demonstrates

that her "banking experience" had been embellished by the agency and also that she had no teaching credentials whatsoever. Although we do not dispute the fact that this employee (the ST) may well have had outstanding qualities, the issue before us is whether this individual was equally or better qualified than appellant. The weight of the evidence establishes that she was not. We find no merit in the agency's contention, as stated in its FAD, that it was appellant's performance as supervisor and not his performance as an accountant which provided the basis for his non-selection. There is not evidence that he was counseled over these deficiencies. He received a highly successful appraisal during his tenure as supervisor. He was issued a glowing supervisory appraisal for promotion to a supervisory position as Assistant Chief of Fiscal Services in another location.

This Commission has consistently held that employers have greater flexibility when choosing management-level employees, because of the nature of such positions. *Wrenn v. Gould*, 808 F.2d 493 (6th Cir. 1987). We find, however, that the ST's experience and qualifications for the job could not compare to appellant's. In cases where the complainant is found objectively better qualified than the ST, the use of subjective criteria such as "motivation," "initiative," and "cooperation" while not impermissible, "may offer a convenient pretext for giving force and effect to . . . prejudice." *Thornton v. Coffey*, 618 F.2d 686, 691 (10th Cir. 1980). Such standardless subjective criteria have been found to be convenient mechanisms for discrimination. *Boykin v. Georgia Pacific Corp.*, 706 F.2d 1384, 1390 (5th Cir. 1983); *cert. denied*, 465 U.S. 1006 (1984). This is particularly true where, as here, the subjective reasons

given for not choosing appellant were unsupported by independent evidence.

In light of all the above, the Commission is not persuaded that the agency has rebutted the inference of discrimination established by appellant through his *prima facie* case. We find that the inconsistencies found in the testimony provided by the SOs, when compared with other evidence of record, discredit the agency's proffered reasons. As the record stands, we conclude that the agency's reasons to justify its selection of the ST lack credence and were a pretext for discrimination.

CONCLUSION

Accordingly, after a review of the entire record, the Commission hereby **REVERSES** the final agency's decision. The agency shall comply with the following **ORDER**.

ORDER (D1092)

The agency is **ORDERED** to take the following remedial action:

Within 30 calendar days of its receipt of this decision, the agency shall promote appellant to the position of Supervisory Accountant, GS-11/12, retroactive to the date the ST was selected.

The agency shall determine the appropriate amount of backpay with interest, and other benefits due appellant, pursuant to 29 C.F.R. §1614.501, no later than sixty (60) calendar days after the date this decision becomes final. The appellant shall cooperate in the agency's efforts to compute the amount of backpay and benefits due, and

shall provide all relevant information requested by the agency. If there is a dispute regarding the exact amount of backpay and/or benefits, the agency shall issue a check to the appellant for the undisputed amount within sixty (60) calendar days of the date the agency determines the amount it believes to be due. The appellant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation of the agency's calculation of backpay and other benefits due appellant, including evidence that the corrective action has been implemented.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0595)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the appellant. If the agency does not comply with the Commission's order, the appellant may petition the Commission for enforcement of the order. 29 C.F.R.

§1614.503 (a). The appellant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. *See* 29 C.F.R. §§1614.408, 1614.409, and 1614.503 (g). Alternatively, the appellant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§1614.408 and 1614.409. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. §2000e-16(c) (Supp. V 1993). If the appellant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. *See* 29 C.F.R. §1614.410.

POSTING ORDER (G1092)

The agency is ORDERED to post copies of the attached notice at the Supply Depot, Hines, Illinois. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

ATTORNEY'S FEES (H1092)

If applicant has been represented by an attorney (as defined by 29 C.F.R. §1614.501 (e)(1)(iii)), he/she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. §1614.501 (e). The award of attorney's fees shall be paid by the agency. The attorney shall submit a verified statement of fees to the agency—not to the Equal Employment Opportunity Commission, Office of the Federal Operations—within thirty (30) calendar days of this decision becoming final. The agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. §1614.501.

STATEMENT OF RIGHTS-ON APPEAL

RECONSIDERATION (M0795)

The Commission may, in its discretion, reconsider the decision in this case if the appellant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or
2. The previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or
3. The decision is of such exceptional nature as to have substantial precedential implications.

Requests to reconsider, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date you receive this decision, or WITHIN TWENTY (20) CALENDAR DAYS of the date you receive a timely request to reconsider filed by another party. Any argument in opposition to the request to reconsider or cross request to reconsider MUST be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reconsider. See 29 C.F.R. §1614.407. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed filed on the date it is received by the Commission.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely. If extenuating circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

RIGHT TO FILE A CIVIL ACTION (R0993)

This is a decision requiring the agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District

Court. It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision. You should be aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or to consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed. In the alternative, you may file a civil action AFTER ONE HUNDRED AND EIGHTY (180) CALENDAR DAYS of the date you filed your complaint with the agency, or filed your appeal with the Commission. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action

without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

/s/ RONNIE BLUMENTHAL
 RONNIE BLUMENTHAL, Director
 Office of Federal Operations

OCT 06 1995

DATE

[Seal Omitted]

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Washington, D.C. 20036

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
An Agency of the United States Government

This Notice is posted pursuant to an Order by the United States Equal Employment Opportunity Commission dated _____ which found that a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* has occurred at this facility.

Federal law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE, or PHYSICAL or MENTAL DISABILITY with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment.

The Supply Depot at Hines, Illinois, supports and will comply with such Federal law and will not take action against individuals because they have exercised their rights under law.

The Supply Depot at Hines, Illinois, has remedied the employee affected by the Commission's finding. The Supply Depot at Hines, Illinois, will ensure that officials responsible for personnel decisions and terms and conditions of employment will abide by the require-

ments of all Federal equal employment opportunity laws.

The Supply Depot at Hines, Illinois, will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercise his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, Federal equal employment opportunity law.

Date Posted: _____

Posting Expires: _____

29 C.F.R. Part 1614

29 C.F.R. (Ch. XIV (7-1-97 edition))

**PART 1614—FEDERAL SECTOR
EQUAL EMPLOYMENT OPPORTUNITY
SUBPART A—AGENCY PROGRAM TO PROMOTE
EQUAL EMPLOYMENT OPPORTUNITY**

§ 1614.101 General policy.

(a) It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age or handicap and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

(b) No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII) (42 U.S.C. 2000e *et seq.*), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. 621 *et seq.*), the Equal Pay Act (29 U.S.C. 206(d)) or the Rehabilitation Act (29 U.S.C. 791 *et seq.*) or for participating in any stage of administrative or judicial proceedings under those statutes.

§ 1614.102 Agency program.

(a) Each agency shall maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies. In support of this program, the agency shall:

(1) Provide sufficient resources to its equal employment opportunity program to ensure efficient and successful operation;

(2) Provide for the prompt, fair and impartial processing of complaints in accordance with this part and

the instructions contained in the Commission's Management Directives;

(3) Conduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices and working conditions;

(4) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, national origin, age or handicap, and solicit their recruitment assistance on a continuing basis;

(5) Review, evaluate and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(6) Take appropriate disciplinary action against employees who engage in discriminatory practices;

(7) Make reasonable accommodation to the religious needs of applicants and employees when those accommodations can be made without undue hardship on the business of the agency;

(8) Make reasonable accommodation to the known physical or mental limitations of qualified applicants and employees with handicaps unless the accommodation would impose an undue hardship on the operation of the agency's program;

(9) Reassign, in accordance with § 1614.203(g), non-probationary employees who develop physical or mental limitations that prevent them from performing the essential functions of their positions even with reasonable accommodation;

(10) Provide recognition to employees, supervisors, managers and units demonstrating superior accomplishment in equal employment opportunity;

(11) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort;

(12) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(13) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation; and

(14) Participate at the community level with other employers, with schools and universities and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability.

(b) In order to implement its program, each agency shall:

(1) Develop the plans, procedures and regulations necessary to carry out its program;

(2) Appraise its personnel operations at regular intervals to assure their conformity with its program,

this part 1614 and the instructions contained in the Commission's management directives;

(3) Designate a Director of Equal Employment Opportunity (EEO Director), EEO Officer(s), and such Special Emphasis Program Managers (e.g., People With Disabilities Program, Federal Women's Program and Hispanic Employment Program), clerical and administrative support as may be necessary to carry out the functions described in this part in all organizational units of the agency and at all agency installations. The EEO Director shall be under the immediate supervision of the agency head;

(4) Make written materials available to all employees and applicants informing them of the variety of equal employment opportunity programs and administrative and judicial remedial procedures available to them and prominently post such written materials in all personnel and EEO offices and throughout the workplace;

(5) Ensure that full cooperation is provided by all agency employees to EEO Counselors and agency EEO personnel in the processing and resolution of pre-complaint matters and complaints within an agency and that full cooperation is provided to the Commission in the course of appeals, including granting the Commission routine access to personnel records of the agency when required in connection with an investigation; and

(6) Publicize to all employees and post at all times the names, business telephone numbers and business addresses of the EEO Counselors (unless the counseling function is centralized, in which case only the telephone number and address need be publicized and posted), a notice of the time limits and necessity of

contacting a Counselor before filing a complaint and the telephone numbers and addresses of the EEO Director, EEO Officer(s) and Special Emphasis Program Managers.

(c) Under each agency program, the EEO Director shall be responsible for:

(1) Advising the head of the agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports and other matters pertaining to the policy in § 1614.101 and the agency program;

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting to the head of the agency with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial, supervisory or other employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and to improve the agency's program for equal employment opportunity;

(4) Providing for counseling of aggrieved individuals and for the receipt and processing of individual and class complaints of discrimination; and

(5) Assuring that individual complaints are fairly and thoroughly investigated and that final decisions are issued in a timely manner in accordance with this part.

(d) Directives, instructions, forms and other Commission materials referenced in this part may be

obtained in accordance with the provisions of 29 CFR 1610.7 of this chapter.

§ 1614.103 Complaints of discrimination covered by this part.

(a) Individual and class complaints of employment discrimination and retaliation prohibited by title VII (discrimination on the basis of race, color, religion, sex and national origin), the ADEA (discrimination on the basis of age when the aggrieved individual is at least 40 years of age), the Rehabilitation Act (discrimination on the basis of handicap) or the Equal Pay Act (sex-based wage discrimination) shall be processed in accordance with this part. Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part.

(b) This part applies to:

(1) Military departments as defined in 5 U.S.C. 102;

(2) Executive agencies as defined in 5 U.S.C. 105;

(3) The United States Postal Service, Postal Rate Commission and Tennessee Valley Authority; and

(4) All units of the legislative and judicial branches of the Federal Government having positions in the competitive service, except for complaints under the Rehabilitation Act.

(c) Within the covered departments, agencies and units, this part applies to all employees and applicants for employment, and to all employment policies or practices affecting employees or applicants for employment including employees and applicants who are paid from nonappropriated funds, unless otherwise excluded.

(d) This part does not apply to:

(1) Uniformed members of the military departments referred to in paragraph (b)(1) of this section:

(2) Employees of the General Accounting Office;

(3) Employees of the Library of Congress;

(4) Aliens employed in positions, or who apply for positions, located outside the limits of the United States; or

(5) Equal Pay Act complaints of employees whose services are performed within a foreign country or certain United States territories as provided in 29 U.S.C. 213(f).

§ 1614.104 Agency processing.

(a) Each agency subject to this part shall adopt procedures for processing individual and class complaints of discrimination that include the provisions contained in §§ 1614.105 through 1614.110 and in § 1614.204, and that are consistent with all other applicable provisions of this part and the instructions for complaint processing contained in the Commission's Management Directives.

(b) The Commission shall periodically review agency resources and procedures to ensure that an agency makes reasonable efforts to resolve complaints informally, to process complaints in a timely manner, to develop adequate factual records, to issue decisions that are consistent with acceptable legal standards, to explain the reasons for its decisions, and to give complainants adequate and timely notice of their rights.

§ 1614.105 Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

(b) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including the right to request a hearing after an investigation by the agency, election rights pursuant to §§ 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to § 1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in precomplaint counseling (or issues like or related to issues raised in pre-complaint counseling) may be

alleged in a subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.

(c) Counselors shall conduct counseling activities in accordance with instructions contained in Commission Management Directives. When advised that a complaint has been filed by an aggrieved person, the Counselor shall submit a written report within 15 days to the agency office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling.

(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the agency has an established dispute resolution procedure under paragraph (f) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person brought the matter to the Counselor's attention. If the matter has not been resolved, the aggrieved person shall be informed in writing by the Counselor, not later than the thirtieth day after contacting the Counselor, of the right to file a discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that

the agency is informed immediately if the complainant retains counsel or a representative.

(e) Prior to the end of the 30-day period, the aggrieved person may agree in writing with the agency to postpone the final interview and extend the counseling period for an additional period of no more than 60 days. If the matter has not been resolved before the conclusion of the agreed extension, the notice described in paragraph (d) of this section shall be issued.

(f) Where the agency has an established dispute resolution procedure and the aggrieved individual agrees to participate in the procedure, the pre-complaint processing period shall be 90 days. If the matter has not been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued.

(g) The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this part from that person involving that same matter.

§ 1614.106 Individual complaints.

(a) A complaint must be filed with the agency that allegedly discriminated against the complainant.

(b) A complaint must be filed within 15 days of receipt of the notice required by § 1614.105 (d), (e) or (f).

(c) A complaint must contain a signed statement from the person claiming to be aggrieved or that per-

son's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted.

(d) The agency shall acknowledge receipt of a complaint in writing and inform the complainant of the date on which the complaint was filed. Such acknowledgement shall also advise the complainant that:

(1) the complainant has the right to appeal the final decision or dismissal of all or a portion of a complaint; and

(2) The agency is required to conduct a complete and fair investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the period.

§ 1614.107 Dismissals of complaints.

The agency shall dismiss a complaint or a portion of a complaint:

(a) That fails to state a claim under § 1614.103 or § 1614.106(a) or states the same claim that is pending before or has been decided by the agency or Commission;

(b) That fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance with § 1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;

(c) That is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;

(d) Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in an appeal to the Merit Systems Protection Board and § 1614.301 or § 1614.302 indicates that the complainant has elected to pursue the non-EEO process;

(e) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory;

(f) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address;

(g) Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available; or

(h) If, prior to the issuance of the notice required by § 1614.108(f), the complainant refuses within 30 days of

receipt of an offer of settlement to accept an agency offer of full relief containing a certification from the agency's EEO Director, Chief Legal Officer or a designee reporting directly to the EEO Director or the Chief Legal Officer that the offer constitutes full relief, provided that the offer gave notice that failure to accept would result in dismissal of the complaint. An offer of full relief under this subsection is the appropriate relief in § 1614.501.

§ 1614.108 Investigation of complaints.

(a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed.

(b) In accordance with instructions contained in Commission Management Directives, the agency shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint. Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue. Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.

(c) The procedures in paragraphs (c) (1) through (3) of this section apply to the investigation of complaints:

(1) The complainant, the agency, and any employee of a federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or

affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate.

(d) Any investigation will be conducted by investigators with appropriate security clearances. The Commission will, upon request, supply the agency with the name of an investigator with appropriate security clearances.

(e) The agency shall complete its investigation within 180 days of the date of filing of an individual complaint or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to § 1614.107. By

written agreement within those time periods, the complainant and the respondent agency may voluntarily extend the time period for not more than an additional 90 days. The agency may unilaterally extend the time period or any period of extension for not more than 30 days where it must sanitize a complaint file that may contain information classified pursuant to Exec. Order No. 12356, or successor orders, as secret in the interest of national defense or foreign policy, provided the investigating agency notifies the parties of the extension.

(f) Within 180 days from the filing of the complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the agency shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing before an administrative judge or may receive an immediate final decision pursuant to § 1614.110 from the agency with which the complaint was filed. In the absence of the required notice, the complainant may request a hearing at any time after 180 days has elapsed from the filing of the complaint.

§ 1614.109 Hearings.

(a) When a complainant requests a hearing, the agency shall request that the Commission appoint an administrative judge to conduct a hearing in accordance with this section. Any hearing will be conducted by an administrative judge or hearing examiner with appropriate security clearances. Where the administrative

judge determines that the complainant is raising or intends to pursue issues like or related to those raised in the complaint, but which the agency has not had an opportunity to address, the administrative judge shall remand any such issue for counseling in accordance with § 1614.105 for such other processing as ordered by the administrative judge.

(b) *Discovery.* The administrative judge shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate. Unless the parties agree in writing concerning the methods and scope of discovery, the party seeking discovery shall request authorization from the administrative judge prior to commencing discovery. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint, but the administrative judge may limit the quantity and timing of discovery. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(c) *Conduct of hearing.* Agencies shall provide for the attendance at a hearing of all employees approved as witnesses by an administrative judge. Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public. The administrative judge shall have the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any

person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The administrative judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence. The administrative judge or the Commission may refer to the Disciplinary Committee of the appropriate Bar Association any attorney or, upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or agencies in EEOC hearings any representative who refuses to follow the orders of an administrative judge, or who otherwise engages in improper conduct.

(d) The procedures in paragraphs (d) (1) through (3) of this section apply to hearings of complaints:

(1) The complainant, an agency, and any employee of a federal agency shall produce such documentary and testimonial evidence as the administrative judge deems necessary.

(2) Administrative judges are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness,

would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as appropriate.

(e) *Findings and conclusions without hearing.* (1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any such material fact. The party shall serve the statement on the opposing party.

(2) The opposing party may file an opposition within 15 days of receipt of the statement in paragraph (d)(1) of this section. The opposition may refer to the record in the case to rebut the statement that a fact is not in dispute or may file an affidavit stating that the party cannot, for reasons stated, present facts to oppose the request. After considering the submissions, the administrative judge may order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, issue findings and con-

clusions without a hearing or make such other ruling as is appropriate.

(3) If the administrative judge determines upon his or her own initiative that some or all facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue an order limiting the scope of the hearing or issue findings and conclusions without holding a hearing.

(f) *Record of hearing.* The hearing shall be recorded and the agency shall arrange and pay for verbatim transcripts. All documents submitted to, and accepted by, the administrative judge at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, the administrative judge shall make the document available to the agency representative for reproduction.

(g) *Findings and conclusions.* Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing findings of fact and conclusions of law, within 180 days of a request for a hearing being received by EEOC, an administrative judge shall issue findings of fact and conclusions of law on the merits of the complaint, and shall order appropriate relief where discrimination is found with regard to the matter that gave rise to the complaint. The administrative judge shall send copies of the entire record, including the transcript, and the findings and conclusions to the parties by certified mail, return receipt requested. Within 60 days of receipt of the findings and conclusions, the agency may reject or modify the findings and conclusions or the relief

ordered by the administrative judge and issue a final decision in accordance with § 1614.110. If an agency does not, within 60 days of receipt, reject or modify the findings and conclusions of the administrative judge, then the findings and conclusions of the administrative judge and the relief ordered shall become the final decision of the agency and the agency shall notify the complainant of the final decision in accordance with § 1614.110.

§ 1614.110 Final decisions.

Within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision, or within 60 days of receiving the findings and conclusions of an administrative judge, the agency shall issue a final decision. The final decision shall consist of findings by the agency on the merits of each issue in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart E of this part. The final decision shall contain notice of the right to appeal to the Commission, the name and address of the agency official upon whom an appeal should be served, notice of the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573, Notice of Appeal/Petition, shall be attached to the decision.

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SUBPART D-APPEALS AND CIVIL ACTIONS

§ 1614.401 Appeals to the Commission.

(a) A complainant may appeal an agency's final decision, or the agency's dismissal of all or a portion of a complaint.

(b) An agent may appeal the agency decision accepting or dismissing all or a portion of a class complaint, or a final decision on a class complaint; a class member may appeal a final decision on a claim for individual relief under a class complaint; and both may appeal a final decision on a petition pursuant to § 1614.204(g)(4).

(c) A grievant may appeal the final decision of the agency, the arbitrator or the Federal Labor Relations Authority (FLRA) on the grievance when an issue of employment discrimination was raised in a negotiated grievance procedure that permits such issues to be raised. A grievant may not appeal under this part, however, when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration, is before the FLRA, is appealable to the MSPB or if 5 U.S.C. 7121(d) is inapplicable to the involved agency.

(d) A complainant, agent or individual class claimant may appeal to the Commission an agency's alleged noncompliance with a settlement agreement or final decision in accordance with § 1614.504.

§ 1614.402 Time for appeals to the Commission.

(a) Except for mixed case complaints, any dismissal of a complaint or a portion of a complaint or any final decision may be appealed to the Commission within 30 days of the complainant's receipt of the dismissal or final decision. Any grievance decision may be appealed

within 30 days of receipt of a decision referred to in § 1614.401(c). In the case of class complaints, any final decision received by an agent, petitioner or an individual claimant may be appealed to the Commission within 30 days of its receipt. Where a complainant has notified the EEO Director of alleged noncompliance with a settlement agreement in accordance with § 1614.504, the complainant may file an appeal 35 days after service of the allegations of noncompliance, but must file an appeal within 30 days of receipt of an agency's determination.

(b) If the complainant is represented by an attorney of record, then the 30-day time period provided in paragraph (a) of this section within which to appeal shall be calculated from the receipt of the required document by the attorney. In all other instances, the time within which to appeal shall be calculated from the receipt of the required document by the complainant.

§ 1614.403 How to appeal.

(a) The complainant, agent, grievant or individual class claimant (hereinafter complainant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P.O. Box 19848, Washington, DC 20036, or by personal delivery or facsimile. The complainant should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what he or she is appealing.

(b) The complainant shall furnish a copy of the appeal to the agency's EEO Director (or whomever is designated by the agency in the dismissal or decision) at the same time that he or she files the appeal with the Commission. In or attached to the appeal to the Com-

mission, the complainant must certify the date and method by which service was made on the agency.

(c) If a complainant does not file an appeal within the time limits of this subpart, the appeal will be untimely and shall be dismissed by the Commission.

(d) Any statement or brief in support of the appeal must be submitted to the Director, Office of Federal Operations, and to the agency within 30 days of filing the appeal. Following receipt of the appeal and any brief in support of the appeal, the Director, Office of Federal Operation, will request the complaint file from the agency. The agency must submit the complaint file and any agency statement or brief in opposition to the appeal to the Director, Office of Federal Operations, within 30 days of receipt of the Commission's request for the complaint file, which has been made by certified mail. A copy of the agency's statement or brief must be served on the complainant at the same time.

§ 1614.404 Appellate procedure.

(a) On behalf of the Commission, the Office of Federal Operations shall review the complaint file and all written statements and briefs from either party. The Commission may supplement the record by an exchange of letters or memoranda, investigation, remand to the agency or other procedures.

(b) If the Office of Federal Operations requests information from one or both of the parties to supplement the record, each party providing information shall send a copy of the information to the other party.

§ 1614.405 Decisions on appeals.

(a) The Office of Federal Operations, on behalf of the Commission, shall issue a written decision setting

forth its reasons for the decision. The Commission shall dismiss appeals in accordance with §§ 1614.107, 1614.403(c) and 1614.410. The decision shall be based on the preponderance of the evidence. If the decision contains a finding of discrimination, appropriate remedy(ies) shall be included and, where appropriate, the entitlement to interest, attorney's fees or costs shall be indicated. The decision shall reflect the date of its issuance, inform the complainant of his or her civil action rights, and be transmitted to the complainant and the agency by certified mail, return receipt requested.

(b) A decision issued under paragraph (a) of this section is final within the meaning of § 1614.408 unless:

(1) Either party files a timely request for reconsideration pursuant to § 1614.407; or

(2) The Commission on its own motion reconsiders the case.

§ 1614.406 Time limits. [Reserved]

§ 1614.407 Reconsideration.

(a) Within a reasonable period of time, the Commission may, in its discretion, reconsider any decision of the Commission issued under § 1614.405(a) notwithstanding any other provisions of this part.

(b) A party may request reconsideration of any decision issued under § 1614.405(a) provided that such request is made within 30 days of receipt of a decision of the Commission or within 20 days of receipt of another party's timely request for reconsideration. Such request, along with any supporting statement or brief, shall be submitted to the Office of Review and Appeals and to all parties with proof of such sub-

mission. All other parties shall have 20 days from the date of service in which to submit all other parties, with proof of submission, any statement or brief in opposition to the request.

(c) The request or the statement or brief in support of the request shall contain arguments or evidence which tend to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued; or

(2) The previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or

(3) The decision is of such exceptional nature as to have substantial precedential implications.

(d) A decision on a request for reconsideration by either party is final and there is no further right by either party to request reconsideration of the decision for which reconsideration was sought.

§ 1614.408 Civil action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act.

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court:

(a) Within 90 days of receipt of the final decision on an individual or class complaint if no appeal has been filed;

(b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and a final decision has not been issued;

(c) Within 90 days of receipt of the Commission's final decision on an appeal; or

(d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

§ 1614.409 Civil action: Equal Pay Act.

A complainant is authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. 216(b)) to file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, three years of the date of the alleged violation of the Equal Pay Act regardless of whether he or she pursued any administrative complaint processing. Recovery of back wages is limited to two years prior to the date of filing suit, or to three years if the violation is deemed willful; liquidated damages in an equal amount may also be awarded. The filing of a complaint or appeal under this part shall not toll the time for filing a civil action.

§ 1614.410 Effect of filing a civil action.

Filing a civil action under § 1614.408 or § 1614.409 shall terminate Commission processing of the appeal. If private suit is filed subsequent to the filing of an appeal, the parties are requested to notify the Commission in writing.

SUBPART E—REMEDIES AND ENFORCEMENT

§ 1614.501 Remedies and relief.

(a) When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or

an employee has been discriminated against, the agency shall provide full relief which shall include the following elements in appropriate circumstances:

(1) Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur;

(2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur;

(3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;

(4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) Commitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case.

(b) *Relief for an applicant.* (1)(i) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position that the applicant would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination. The offer shall be made in writing. The individual shall have 15 days from receipt of the offer within which to accept or decline the offer. Failure to

accept the offer within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his or her control prevented a response within the time limit.

(ii) If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired. Back pay, computed in the manner prescribed by 5 CFR 550.805, shall be awarded from the date the individual would have entered on duty until the date the individual actually enters on duty unless clear and convincing evidence indicates that the applicant would not have been selected even absent discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The individual shall be deemed to have performed service for the agency during this period for all purposes except for meeting service requirements for completion of a required probationary or trial period.

(iii) If the offer of employment is declined, the agency shall award the individual a sum equal to the back pay he or she would have received, computed in the manner prescribed by 5 CFR 550.805, from the date he or she would have been appointed until the date the offer was declined, subject to the limitation of paragraph (b)(3) of this section. Interest on back pay shall be included in the back pay computation. The agency shall inform the applicant, in its offer of employment, of the right to this award in the event the offer is declined.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but also finds by clear and convincing evidence that the applicant would not have been hired even absent discrimination, the agency shall

nevertheless take all steps necessary to eliminate the discriminatory practice and ensure it does not recur.

(3) Back pay under this paragraph (b) for complaints under title VII or the Rehabilitation Act may not extend from a date earlier than two years prior to the date on which the complaint was initially filed by the applicant.

(c) *Relief for an employee.* When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

(1) Nondiscriminatory placement, with back pay computed in the manner prescribed by 5 CFR 550.805, unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The back pay liability under title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

(2) If clear and convincing evidence indicates that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the agency shall nevertheless eliminate any discriminatory practice and ensure it does not recur.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any adverse materials relating to the discriminatory employment practice.

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

(d) The agency has the burden of proving by a preponderance of the evidence that the complainant has failed to mitigate his or her damages.

(e) *Attorney's fees or costs*—(1) *Awards of attorney's fees or costs.* The provisions of this paragraph relating to the award of attorney's fees or costs shall apply to allegations of discrimination prohibited by title VII and the Rehabilitation Act. In a notice of final action or a decision, the agency or Commission may award the applicant or employee reasonable attorney's fees or costs (including expert witness fees) incurred in the processing of the complaint.

(i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.

(ii) Any award of attorney's fees or costs shall be paid by the agency.

(iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government.

(iv) Attorney's fees shall be paid only for services performed after the filing of a written complaint and after the complainant has notified the agency that he or she is represented by an attorney, except that fees allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. Written submissions to the agency that

are signed by the representative shall be deemed to constitute notice of representation.

(2) *Amount of awards.* (i) When the agency or the Commission awards attorney's fees or costs, the complainant's attorney shall submit a verified statement of costs and attorney's fees (including expert witness fees), as appropriate, to the agency within 30 days of receipt of the decision unless a request for reconsideration is filed. A statement of attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services and both the verified statement and the accompanying affidavit shall be made a part of the complaint file. The amount of attorney's fees or costs to be awarded the complainant shall be determined by agreement between the complainant, the complainant's representative and the agency. Such agreement shall immediately be reduced to writing.

(ii)(A) If the complainant, the representative and the agency cannot reach an agreement on the amount of attorney's fees or costs within 20 days of the agency's receipt of the verified statement and accompanying affidavit, the agency shall issue a decision determining the amount of attorney's fees or costs due within 30 days of receipt of the statement and affidavit. The decision shall include a notice of right to appeal to the EEOC along with EEOC Form 573, Notice of Appeal/Petition and shall include the specific reasons for determining the amount of the award.

(B) The amount of attorney's fees shall be calculated in accordance with existing case law using the following standards: The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate. This amount may be reduced or increased

in consideration of the following factors, although ordinarily many of these factors are subsumed within the calculation set forth in this paragraph (e)(2)(ii)(B): The time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the attorney's preclusion from other employment due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation, and ability of the attorney, the undesirability of the case, the nature and length of the professional relationship with the client, and the awards in similar cases. Only in cases of exceptional success should any of these factors be used to enhance an award computed by the formula set forth in this paragraph (e)(2)(ii)(B).

(C) The costs that may be awarded are those authorized by 28 U.S.C. 1920 to include: Fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case; fees and disbursements for printing and witnesses; and fees for exemplification and copies necessarily obtained for use in the case.

(iii) Witness fees shall be awarded in accordance with the provisions of 28 U.S.C. 1821, except that no award shall be made for a federal employee who is in a duty status when made available as a witness.

§ 1614.502 Compliance with final Commission decisions.

(a) Relief ordered in a final decision on appeal to the Commission is mandatory and binding on the agency except as provided in § 1614.405(b). Failure to imple-

ment ordered relief shall be subject to judicial enforcement as specified in § 1614.503(g).

(b) Notwithstanding paragraph (a) of this section, when the agency requests reconsideration, when the case involves removal, separation, or suspension continuing beyond the date of the request for reconsideration, and when the decision recommends retroactive restoration, the agency shall comply with the decision only to the extent of the temporary or conditional restoration of the employee to duty status in the position recommended by the Commission, pending the outcome of the agency request for reconsideration.

(1) Service under the temporary or conditional restoration provisions of this paragraph (b) shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, if the Commission upholds its decision after reconsideration.

(2) The agency shall notify the Commission and the employee in writing, at the same time it requests reconsideration, that the relief it provides is temporary or conditional.

(c) When no request for reconsideration is filed or when a request for reconsideration is denied, the agency shall provide the relief ordered and there is no further right to delay implementation of the ordered relief. The relief shall be provided in full not later than 60 days after receipt of the final decision unless otherwise ordered in the decision.

§ 1614.503 Enforcement of final Commission decisions.

(a) *Petition for enforcement.* A complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction. The petition shall be submitted to the Office of Federal Operations. The petition shall specifically set forth the reasons that lead the complainant to believe that the agency is not complying with the decision.

(b) *Compliance.* On behalf of the Commission, the Office of Federal Operations shall take all necessary action to ascertain whether the agency is implementing the decision of the Commission. If the agency is found not to be in compliance with the decision, efforts shall be undertaken to obtain compliance.

(c) *Clarification.* On behalf of the Commission, the Office of Federal Operations may, on its own motion or in response to a petition for enforcement or in connection with a timely request for reconsideration, issue a clarification of a prior decision. A clarification cannot change the result of a prior decision or enlarge or diminish the relief ordered but may further explain the meaning or intent of the prior decision.

(d) *Referral to the Commission.* Where the Director, Office of Federal Operations, is unable to obtain satisfactory compliance with the final decision, the Director shall submit appropriate findings and recommendations for enforcement to the Commission, or, as directed by the Commission, refer the matter to another appropriate agency.

(e) *Commission notice to show cause.* The Commission may issue a notice to the head of any federal agency that has failed to comply with a decision to show

cause why there is noncompliance. Such notice may request the head of the agency or a representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons for non-compliance.

(f) *Certification to the Office of Special Counsel.* Where appropriate and pursuant to the terms of a memorandum of understanding, the Commission may refer the matter to the Office of Special Counsel for enforcement action.

(g) *Notification to complainant of completion of administrative efforts.* Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit any required report of compliance, the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to Title VII, the ADEA, the Equal Pay Act or the Rehabilitation Act and to seek judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedure Act, 5 U.S.C. 701 et seq., and the mandamus statute, 28 U.S.C. 1361, or to commence de novo proceedings pursuant to the appropriate statutes.

§ 1614.504 Compliance with settlement agreements and final decisions.

(a) Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. A final decision that has not been the subject of an appeal or civil action shall be binding on the agency. If the complainant believes that the agency has failed to comply with the terms of a settlement agreement or

final decision, the complainant shall notify the EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of [the] settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

(b) The agency shall resolve the matter and respond to the complainant, in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement or final decision. The complainant may file such an appeal 35 days after he or she has served the agency with the allegations of noncompliance, but must file an appeal within 30 days of his or her receipt of an agency's determination. The complainant must serve a copy of the appeal on the agency and the agency may submit a response to the Commission within 30 days of receiving notice of the appeal.

(c) Prior to rendering its determination, the Commission may request that parties submit whatever additional information or documentation it deems necessary or may direct that an investigation or hearing on the matter be conducted. If the Commission determines that the agency is not in compliance and the noncompliance is not attributable to acts or conduct of the complainant, it may order such compliance or it may order that the complaint be reinstated for further processing from the point processing ceased. Allegations that subsequent acts of discrimination violate a

settlement agreement shall be processed as separate complaints under § 1614.106 or § 1614.204, as appropriate, rather than under this section.